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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 994.

ROBERT McCLELLAN,
Appellant,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Appellee.

MOTION TO DISMISS.

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v.

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Appellee.

MOTION TO DISMISS.

The Appellee moves this Court for its order dismissing the appeal of the Appellant herein on the grounds that the facts in this case do not raise the Constitutional questions argued by the Appellant and in any event such facts do not present any substantial Federal or Constitutional question.

PRELIMINARY STATEMENT.

Ohio Revised Code § 2307.37 has been held to be Constitutional by the Ohio Supreme Court in *Loftus v. Pennsylvania Railroad Company*, 107 Ohio St. 352 (1923).

The Ohio Supreme Court has denied Appellant's motion to certify the record of this case from the Ohio Court of Appeals (8th Appellate District) which had theretofore affirmed the judgment of the Court of Common Pleas for Cuyahoga County dismissing Appellant's petition on authority of Ohio Revised Code § 2307.37 and *Loftus v. Penna. R. Co., supra.*

This appeal should be dismissed for the following reasons:

1. Upon the authority of *Loftus v. Penna. R. Co.*, *supra*.

2. The arguments advanced by the Appellant relating to the failure of the Ohio Supreme Court to distinguish between "residence" and "citizenship" are hypothetical in nature and not supported by authority.

3. The record in this case does not disclose that the Appellant has been deprived of any substantial Constitutional rights.

Emphasis added throughout by boldface type.

PRIVILEGES AND IMMUNITIES.

A.

The thrust of the Appellant's appeal is based upon the contention that Ohio Revised Code § 2307.37 is unconstitutional in that it is construed by the Supreme Court of Ohio to deny non-citizens of Ohio the same rights to use Ohio courts that are available to citizens of Ohio.

This contention is based upon the hypothesis that the statute is drafted in terms of residence and "it is obvious that the term 'residence' is an equivalent to 'citizenship' " from the context of the statute.

Inasmuch as the hypothesis upon which the Appellant bases his contention was expressly disposed of in *Loftus*, it should be sufficient rebuttal to the Appellant's entire argument to point out that portion of the opinion where the court stated at page 363:

> "* * * **The statute is based upon residence without regard to citizenship.** That residence and citizen-

> ship are not synonymous, and that discrimination on the basis of residence, within reasonable limits, is not a discrimination against citizenship, within the meaning of the constitutional mandate, is established by many authorities, * * *."

That the portion of the Court's opinion in *Loftus* quoted by the Appellant (St. of Jur. p. 7) rather than disclosing that the Ohio court confounded the distinction between residence and citizenship; clearly points out the distinction that was made by the Court.

In an attempt to overcome this distinction the Appellant contends that the 14th Amendment "defines citizenship as residence." However, the obliteration of any distinction between residence and citizenship is not only not justified by the provisions of the 14th Amendment, such a construction is not warranted by the pronouncements of this Court. *Missouri, ex rel. Southern Ry. Co. v. Mayfield*, 340 U. S. 1 (1950); *Slaughter-House* cases, 83 U. S. 36 (1873).

The operation of Ohio Revised Code § 2307.37 advanced by Appellant to prove his hypothesis is completely without merit. If, for example, mislabeling a dangerous commodity by any railroad in the State of Ohio is negligence and that negligence causes injury or damage to anyone outside the State of Ohio, the injured person may prosecute his action against the offending railroad within the State of Ohio. The statute specifically so provides.

The Appellant has not been deprived of any right of access to the Ohio courts that would be available to an Ohio citizen under the same or similar facts giving rise to the cause of action sought to be maintained. The appeal on this ground ought to be dismissed.

EQUAL PROTECTION.

B.

It is the Appellee's conception of the equal protection clause of the 14th Amendment that nothing therein is intended to deprive the states of their legislative power to establish and regulate judicial proceedings. Revised Code § 2307.37 which is characterized throughout the Appellant's Jurisdictional Statement as the "Ohio Railway Venue Statute," does not apply to railroads alone nor does it constitute class legislation.

The assertion that railroads are the **only** transportation organizations to which Ohio Revised Code § 2307.37 can **now** apply is a gratuitous generalization on behalf of the Appellant which is not warranted by the record or the facts which would be available to the Appellant upon a trial of this case. That evidence that other transportation systems are affected is readily available, but not a part of this record, was recognized by both Appellate courts of Ohio during the oral arguments of this matter.

The question as to whether or not citizens of Ohio are afforded rights of access to Ohio courts which are not afforded to the Appellant is the question which the Appellant is attempting to place before this Court. Whether or not the classification set forth in Ohio Revised Code § 2307.37 may constitute class legislation in derogation of the rights of some other types of transportation facilities is not a justiciable issue in this appeal.

C.

The hypothesis that the Appellant might have a claim which might be brought in an Ohio court certainly raises no issue as to the violation of any of the Appellant's rights in this action.

That the Legislature may prefer residence as a prerequisite to access to Ohio courts so long as citizens of the State of Ohio and other states are treated equally violates no right afforded to the Appellant under the 14th Amendment. Such a condition precedent was recognized in *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U. S. 1 (1950), cited by the Appellant in support of his position. *Loftus v. Penna. R. Co., supra.*

The Appellant, a life-long citizen and resident of the State of West Virginia, whose cause of action arose in the State of Kentucky, has been afforded every right available to a citizen of the State of Ohio injured outside the state while a non-resident of the State of Ohio. *Loftus v. Penna. R. Co., supra.*

The attempt to place Ohio Revised Code § 2307.37 in that category of that legislation known as "class legislation" by the example advanced (St. of Jur. pp. 9, 10) by the Appellant does not warrant comment. The selection of a date by Appellant contrary to that of the statute does not sustain any argument that the date set forth in the statute is "arbitrary." However, even if such a proposition were true, it could not support the Appellant who it is admitted "is a citizen and lifetime resident of West Virginia."

The appeal on this ground ought to be dismissed.

SUPREMACY CLAUSE.

The supremacy of the Federal statute, upon which the Appellant bases his cause of action against the Appellee, over the procedural statutes of the State of Ohio is argued before this Court for the first time in this action.

The argument of the Appellant cannot be taken seriously in view of this Court's pronouncements in *Miles v. Illinois Central R. Co.*, 315 U. S. 698 (1942) at page

702; *Missouri, ex rel. Southern Ry. Co. v. Mayfield*, 340 U. S. 1 (1950); *Loftus v. Penna. R. Co.*, 107 Ohio St. 352 (1923).

The request that this Court review the discrimination alleged to exist in the Ohio courts against the enforcement of causes of action arising under the Federal Employers' Liability Act is ridiculous. Appellant's attention to *Gallick v. Baltimore and Ohio R. Co.*, 372 U. S. 108 (1963) and *Harris v. Pennsylvania R. Co.*, 361 U. S. 15 (1959) should cause a withdrawal of this contention.

The rights of railroad workers and their causes of action arising under 45 U. S. C. § 56 are not in jeopardy in the State of Ohio, and the Appellant's appeal on this ground ought to be dismissed.

CONCLUSION.

There is no new question of law, Constitutional or otherwise, presented to this Court through this appeal, nor are any of the issues which the Appellant has attempted to raise of great public interest in Ohio. The legal issues involved in this appeal have been disposed of by the Ohio courts agreeably to those Constitutional principles which have been enunciated by this Court.

However, there is a principle involved herein that ought to require the dismissal of this appeal—viz. consistency in advocacy for justice.

It is contended by Appellant's counsel that Appellant ought to have the right to prosecute his action in the Common Pleas Court of Cuyahoga County, Ohio, against the provisions of Ohio Revised Code § 2307.37 despite the fact that the Courts of Kentucky and West Virginia are open to him. It is argued that the Appellant must have equal access to the Common Pleas Court of Cuyahoga County

with the residents of Cuyahoga County as his Constitutional right.

In *Buchanan, et al. v. James A. Rhodes, Kingsley A. Taft* (Case No. C65-159 U. S. D. C. Ohio Eastern Division, now pending) counsel for the Appellant herein has filed a complaint for, and on behalf of, 14 of his clients who have pending cases in the Common Pleas Court of Cuyahoga County, Ohio. All of these 14 plaintiffs are residents of Cuyahoga County, Ohio.

The gravamen of the aforesaid *Buchanan* case is that the 14 individual plaintiffs who have pending cases are being deprived of their right to obtain a speedy trial because of the disproportionate number of judges allowed by law to Cuyahoga County as compared to other counties in the State of Ohio. The allegations state that as of December 31, 1964, 17,350 cases were pending in Cuyahoga County Common Pleas Court, with an average delay for each case of four years from the time of filing to the date of trial.

The suit seeks a mandatory injunction from the Federal District Court sitting at Cleveland, directed to the Legislature of the State of Ohio as well as the Chief Justice of the Ohio Supreme Court requiring the establishment of a plan for the reapportionment of Ohio Common Pleas Judges to provide residents of Cuyahoga County equal protection of the laws and "so as to prevent the continued deprivation of the property rights without due process of law of the plaintiffs" and other residents of Cuyahoga County who have pending cases in the Common Pleas Court of that county.

Finally, the complaint concludes by praying for such "legal and equitable relief" as the Court shall deem just and appropriate.

It appears just and appropriate, that if the allega-

tions of counsel in the complaint in the *Buchanan* case warrant the equitable relief sought for the residents of Cuyahoga County, the contentions of this appeal cannot be justified.

If justice is the "constant and perpetual disposition to render to every man his due" the allowance of this appeal would further deny the residents of Cuyahoga County the Constitutional rights which counsel for the Appellant contends for in the *Buchanan* case. *Loftus v. Penna. R. Co., supra.*

Therefore, the Appellee respectfully moves this Court to dismiss this appeal.

Respectfully submitted,

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